

Gallagher and Associates, PLLC

COUNSELOR AND ATTORNEY AT LAW

February 10, 2009

House Subcommittee on Local Government
Attn: Chairman, Arntzen

RE: House Bill #406

Chairman Arntzen and Members of the Committee,

My name is Bill Gallagher. I am a Land Use Attorney with Gallagher and Associates, PLLC, in Helena, Montana. I urge your rejection of HB 406 in its entirety. This Bill will encourage and perpetuate improper use of the interim zoning process, and will destroy and destabilize the check and balance between local governments authority to zone (to take certain property rights without compensation) and a landowner's private property rights.

Until very recently, counties have enacted interim zoning under 76-2-206 under the procedural due process requirements found in the statute just prior 76-2-205. However, recently two district court decisions, *Farley v Bighorn Co.* #DV-2002-75 (Mont. 22 jud. dist. 2003) and *Fasbender et al v. Lewis and Clark Co.*, BDV-2006-898 (Mont. 1st Jud. Dist. 2007) have divorced interim zoning from the procedural due process requirements found in Part 2 including review by the Planning Board (MCA 76-2-204) and the freeholder protest (MCA 76-2-205(6)). The latter is the subject of an appeal before the Supreme Court of Montana Cause #DA08-0404.

This bill, as opposed to SB 345, provides almost nothing in the way of due process protection and has four very negative components:

- 1) It eliminates the requirement of an emergency circumstance;
- 2) It reduces the number of notices to one;
- 3) It eliminates opportunity for a freeholder protest; and
- 4) It eliminates opportunity for Planning Board review.

Freeholder Protest Planning Board Review: Interim zoning, which can last up to two years, can have dramatic and substantial impact (value and ability to utilize) on the affected property owners. It is critical that the legislature protect the freeholder protest mechanism and Planning Board review as critical checks which balance county authority to take private property rights and the land owner's property rights.

Montana has a long standing tradition of providing the freeholder protest as a check over county's authority to zone and it is available in all three parts of the zoning code, citizen initiated, county zoning and city zoning (including city interim zoning) and in every instance where local government has the authority to create districts that effect real property rights. For example, the creation of conservation districts, MCA 76-15-604, the creation of water quality districts, MCA 7-13-4509, business improvement districts, MCA 7-12-1113, and city annexation, MCA 7-2-4313.


The Legislature has taken care to provide for a non-elected intermediary (Planning Board) between the citizens and the county commission. While the Planning Board has no real power, it acts in an advisory capacity and it seems foolish to eliminate their input which is what this bill would do.

Reduced Notice: Zoning notice provision should not be reduced, but enhanced. A common statement made to me by clients effected by zoning is "I didn't even know they were considering zoning my property." Currently, the two required notices buried in the legal notices section of the paper are inadequate. Especially in light of how zoning can have a substantial impact on the value and use of the property owners. The requirements contained in this amendment are inadequate and inconsistent with other statutory notification requirements dealing with real property.

Emergency Circumstance: Currently, interim zoning requires an emergency circumstance. Eliminating this requirement will only serve to encourage the abuse of an otherwise valuable land use tool. Counties, like Lewis and Clark, replete with a growth plan and ability to enact "regular" zoning, but faced with substantial opposition to a zoning proposal or in instances when a freeholder protest might be possible, would be encouraged (if this bill were enacted) to simply use interim zoning to avoid the check presented by the freeholder protest. Repealing the emergency provision simply encourages the bad policy of counties using interim zoning as a mechanism to avoid this critical check and balance.

This Bill degrades and eliminates important property right protections and is bad policy. I urge the committee's rejection of the Bill in its entirety.

Best regards,



W. A. (Bill) Gallagher